No. 508

IN THE

SUPREME COURT OF THE UNITED STATES

ANDRES LUCAS and ARCHIE L. LISCO, individually and as citizens of the State of Colorado, taxpayers and electors therein, for themselves and for all other persons similarly situated,

Appellants,

vs.

THE FORTY-FOURTH GENERAL ASSEMBLY OF THE STATE OF COLORADO, JOHN LOVE, AS GOVERNOR OF THE STATE OF COLORADO, HOMER BEDFORD AS TREASURER OF THE STATE OF COLORADO, AND BYRON ANDERSON, AS SECRETARY OF STATE OF THE STATE OF COLORADO,

Appellees.

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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STATEMENT OF THE CASE

There has heretofore been filed in accordance with the Rule and by the Appellants, a Jurisdictional Statement and appendices, reference to which is made hereby, and which is appropriately incorporated herein. Within the time prescribed by the Rule, there has been filed on behalf of the Appellees a Motion to Dismiss or Affirm, which Motion does not controvert any of the basic factual matter set forth in the Jurisdictional Statement.

Basically, it is argued that inasmuch as the voters of Colorado have accepted at the polls an amendment to the State Constitution, resulting in a freezing of the Colorado Senate essentially in the manner declared unconstitutional by previous *per curiam* opinion of the Three-Judge Court (Jurisdictional Statement, Appendix A), the fact of that vote is in itself sufficient to render valid, as concerns the Fourteenth Amendment and particularly its equal protection guarantees, the discrimination admittedly implicit in the Senate structure.

It is upon that hypothesis postulated that the matters presented ought not be considered by the Supreme Court of the United States.

Because the Jurisdictional Statement is detailed; because little is set forth in the Motion to Dismiss or Affirm save the assertion that the vote of the people of Colorado serves to negate rights of citizens of the United States under the Fourteenth Amendment, we will only briefly reply herein:

A. THE MOTION TO DISMISS OR AFFIRM SETS FORTH IN SUBSTANCE NONE OF THE GROUNDS FOR SUCH RELIEF PROVIDED IN THE SUPREME COURT RULE.

Motion to Dismiss or Affirm is governed by Rule 16 of this Court. Under subdivision 1(a), it is provided that the court will receive such a motion on the ground that the appeal is not within the jurisdiction of this Court, because not taken in conformity with the statute or the rules. No such contention is made, and, of course, no such fact obtains. The procedure is pre-eminently within the

cognizance of this Court, being a direct appeal from a Court of Three Judges especially convoked because of the high constitutional importance of the issues presented, which has itself unanimously agreed upon the jurisdictional adequacy of the proceedings instituted before it, and which has proceeded with the utmost of expedition with the express purpose of allowing presentation before this Court of a singularly important constitutional question as early as possible.

Section 1(b) is not applicable, relating only to appeals from a state Court.

Section 1(c) notes that this Court will receive such a motion on the ground that "it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument." The question of unsubstantiality of ground, then, is the *only ground* upon which the motion can rest. To state that proposition is to demonstrate its inapplicability at bar.

In essence, the most far reaching decisions rendered by this Court in many years are those relating to the questions of racial segregation and those relating to the questions of representation and franchise, as reflected in the highly differential nature of the composition of the legislatures of the several states. No questions more basic to our constitutional structure have presented themselves in several generations, and their substantiality is beyond question.

In Colorado the question is presented in uniquely pure form. Abuses have been here prevalent in virulent form almost since its admission as a State. Those abuses have continued unabated, the Legislature regularly hav-

ing ignored the express mandate of the Colorado Constitution to reapportion in accordance with population, and the state never having really been properly so apportioned. So manifest are these abuses, and so long continued, that in the initial *per curiam* opinion (Jurisdictional Statement, Appendix A), the Three-Judge Court arrived at the unanimous opinion that the Colorado statutes were unconstitutional and void; that a prima facie case of violation of the Fourteenth Amendment had been made; and that it was unlikely that any legislative relief would be granted.

To date, no Colorado legislature has sat composed either upon a basis consonant with the Colorado Constitution, or upon the basis required under the Fourteenth Amendment.

Because what is described as a group of "insular economic interests" in the State desired the preservation of the discriminatory system, whereby less than one-third of the population dominated the State Legislature, there was presented a Constitutional Amendment, the so-called Amendment 7.

That Amendment recognized population as the necessary basis for the House of Representatives — as the Constitution of Colorado had always recognized population as the *only basis* for both houses — but it absolutely and forever abjured population as a basis for the Senate. After increasing by three members the total membership of the Senate, that Amendment perpetually froze it upon the lines of the districts established by the Statute expressly declared by the trial Court to be unconstitutional, separating the Senate forever from any connection with population.

No rational basis for these distinctions can be found, except that the Trial Court, in the majority opinion of two of its members, radically criticized by the third, attempts to argue that it is necessary to prevent control of the legislature by the majority of the people because that majority, being resident in the populous areas of the State, might not be sufficiently sensible of the special economic interest of the "insular" groups resident in the mountains, interested in mining, in water, and in agriculture.

Admittedly, under the Amendment, the least populated Senate district is allowed one Senator for 18,414 persons. The most heavily populated district, which is one growing continually in relative and absolute population, is allowed and will in perpetuity be allowed one senator, now for 71,871, and perpetually for however many more may inhabit the district. Under the Amendment, 460,620 persons elect 19 members of the Senate. 1,203,328 persons elect 20 members of the Senate. Effectively, less than one-third (1/3) of the population controls the Senate. Obviously, control of either house of the legislature is control of the legislature. It was so designed, and it is candidly stated in the evidence, supported by the Majority Opinion, that this differential is a constitutionally proper one, for there must be a certainty that the "special" or "insular" economic interests outside the urban and suburban portions of the State remain in perpetuity dominant within it.

Historically, the mountain and rural population of Colorado has continually declined, while the urban area, being a narrow strip along the mountains, centering in Denver, has continually increased, and, it is hypothesized, will by 1980 contain more than 90% of the State population. It will still be in a minority legislatively.

No factual challenge to this situation is presented. It is merely said that legislators do not represent people, that there is no necessity of an equation of persons and vote, and that there may be bifurcation of the population basis, scrupulously allowing it in one house, and sedulously ignoring it in another.

We will not fully discuss these matters for the reasons that the differing view is clearly set forth in the Jurisdictional Statement, as in numerous briefs now before this Honorable Supreme Court in cognate cases, and that view is carefully set forth as well in the dissenting Opinion of Judge Doyle in the Three-Judge Court, (Jurisdictional Statement, Appendix B(1)).

Substantiality of the basic question has been thoroughly indicated by this Court heretofore:

1. In the fundamental decision in Baker vs. Carr, 369 U.S. 186 (1962), this Court confirmed the basic thesis that the fourteenth amendment guarantees of equal protection are offended by a gross malapportionment of state legislative election districts, in such manner that the issue becomes a justiciable one, of which the Courts have cognizance, the Court noting that standards might be developed in particular cases and that "judicial standards under the Equal Protection Clause are well developed and familiar."

Since that decision, endeavors to avoid its implication have been rampant, principal among them the endeavor to revamp State constitutions in such manner as to abandon in the one house of the State legislature the principal of popular basis for representation. Such a device is a blatant avoidance of propriety, and, being without historical

basis, or basis in good faith, it is submitted is outside the pale of the permissible. That bare question is presented by the Colorado case. It is submitted that that question is in every sense "substantial" requiring full presentation to and consideration by this Honorable Court.

2. Further implementing its general position in regard to the franchise, this Court has decided Gray vs. Sanders, 372 U.S. 368 (1963), factually different from this case in that the county-~~unit~~ system is there under consideration, but important in that the case would appear to stand for the principal that full equality of voting right is required by the equal protection clause of the fourteenth Amendment. If such is the requirement in a statewide primary, it is difficult to see why that requirement is not paralleledly applicable to state legislative election. Mr. Justice Douglas has noted that the controlling principle must be "one person, one vote". 372 U.S. at 381. Justices Stewart and Clark in concurring agree that the principal of equal protection has within it implicit the thesis of "one voter, one vote." id at 382.

This decision forwards greatly the thesis that franchise is of the very essence of citizenship and that franchise must involve equality, each vote precisely equalling each other. If other than that thesis is applied, then one man is something less than or above or greater than another in law, a thesis which would appear intolerable.

3. In varying form these precise questions, as pointed out in the Jurisdictional Statement (pages 6 and 7) have been presented in a series of cases before this Court. In July of this year, the Court noted probable jurisdiction in each of those cases, so noting in *WMCA, Inc. et al. vs. Simon* (No. 460, Oct. Term, 1962, No. 20,

Oct. Term, 1963); *Maryland Committee For Fair Representation vs. Tawes* (No. 554, Oct. Term, 1962, No. 29, Oct. Term, 1963); *Reynolds vs. Sims*, with which are combined *Roman vs. Frink* and *McConnell vs. Frink* (Nos. 508, 540, and 610, Oct. Term, 1962, Nos. 23, 27, and 41, Oct. Term, 1963); and *Davis vs. Mann*, (No. 797, Oct. Term, 1962, No. 69, Oct. Term, 1963). Probable jurisdiction in each of those cases is noted in memoranda opinions appearing in 83 S. Ct. (1963), at pages 1692 and 1693.

The facts in *Davis vs. Mann*, referred above, are peculiarly cognate to those in Colorado. Historically, as the Three-Judge Court there pointed out, no basis but population really ever existed for representation, and there was no basis for differentiation of the Senate and the House. In the Opinion, 213 F. Supp. 577, the Court says:

> "In this consideration there is no difference in status between the Senators and Delegates in their disposition throughout the State. The Senate and House each have a direct, indeed the same, relation to the people. No analogy of the state Senate with the federal Senate in the present study is sound. The latter is a body representative of the states qua states, but the state Senate is not its regional counterpart. State senatorial districts do not have state autonomy. The bicameral system is a creature of history and many of the reasons for its creation no longer obtain The chief justification for bicameralism in state government now seems to be the thought that it insures agajnst precipitative action — imposing greater deliberation — upon proposed legislation."

The Virginia court found that "no acceptable formula, plan or design is shown us to account for the disparate

divisions of the state." Admittedly, none in Colorado exists, except what is claimed to be economic expediency, the "protection" of "insular economic interests."

Pursuant to the instruction of this Court, the Supreme Court of Michigan has considered the Michigan system in *Scholle vs. Hare*, 116 N.W.2d. 350, 367 Mich. 176. That system involved an almost cognate attempt by Michigan to eliminate equiality of representation by Senate distortion.

In holding invalid the Senate provisions that Court noted:

> "The absence of any semblance of design or plan in the present senatorial districts was recently acknowledged by D. Hale Brake, a Michigan lawyer and former State treasurer from 1943 through 1954, now a constitutional convention delegate, in an article entitled, 'The Old and the New Constitutions — a Comparison and Appraisal' dated May 16, 1962, signed by Mr. Brake as 'Director, Education Division, Michigan Association of Supervisors, 319 W. Lenawee, Lansing 33, Michigan,' and sent to members of the association. Mr. Brake concluded with appropriate accuracy: 'OUR PRESENT SENATE, OF COURSE, DOES NOT FOLLOW ANY PLAN. IT IS SIMPLY AN *ARBITRARILY FREEZING IN OF VARIOUS DISTRICTS.*'"

The Colorado arrangement under Amendment 7 is and purports to be nothing more than an arbitrary freezing in of an existing arrangement which the three-judge court itself declared, as a statute, to be unconstitutional and without logical or legal basis. It is the endeavor to freeze in perpetuity the illegal result of eighty years of

deliberate refusal to follow either the requirements of the State Constitution or the Fourteenth Amendment. It is sought to justify this on the basis that people voted for it.

In candor, it must be stated that the fact that people did or did not vote for it is of no moment. Constitutions are not to be put aside because the people of a state vote for such disjection. The populace of Colorado cannot deprive any member of his rights under the Constitution of the United States by voting an amendment to the Constitution of Colorado, and the thesis that that may be done strikes at the fundament of constitutional government. Constitutional limitations are not bulwarks of reckless majority. The limitations are upon majority, even upon government itself, in protection of those who otherwise are defenseless.

This Court has accepted jurisdiction in the group of cases mentioned above. None of them presents a more cogent basis for consideration of fundamental constitutional problems that the Colorado case. Since this Court has in the cognate cases, arising on almost identical bases in other states, accepted jurisdiction, then it is submitted that the *substantiality* of the questions presented is beyond question. The very fact of their protracted consideration by the trial court indicates them substantial. The fact of a fundamental *legal disagreement* in the three judges constituting that Court indicates that there is substantiality of question presented.

B. AMENDMENT 7 IS IN NO MANNER PROTECTED BECAUSE IT WAS ADOPTED BY POPULAR VOTE.

It is alleged that in some manner the fact that the Colorado population approved by vote the amendment attacked protects that amendment against a charge of invalidity as violative of the equal protection provisions of the Fourteenth Amendment. Colorado was required by the Enabling Act by which it was permitted to enter the Union to adopt a Constitution specifically including the Fourteenth Amendment. When any provision of the State Constitution, adopted by no matter what majority, trespasses upon the area protected by the Fourteenth Amendment, the State Constitution is in that area void. Thus, the Supreme Court of Colorado has repeatedly striken down Constitutional Amendments because they were violative of the provisions of the Constitution of the United States: *People vs. Western Union Telegraph Company*, 70 Colo. 90, 198 Pac. 146, and *People vs. Max*, 70 Colo. 100, 198 Pac. 150 did precisely that. Amendments purportedly prohibited trial judges from passing on constitutionality of purported legislative enactments. The Colorado Court held not only that a judge might do so, but that he must, and any purported limitation placed by the State Constitution on his power so to do violated the Constitution of the United States.

> "What the whole people of a state are powerless to do directly, either by statute or constitution, i.e., set aside the Constitution of the United States, they are equally powerless to do indirectly, either by a pretended authority granted to a municipality, *or by a popular election*, under the guise of a recall. (Em-

phasis supplied). The original Constitution of Colorado was a solemn compact between the State and Federal government, a compact which stipulated that it should never be altered save in the manner therein provided, and that all amendments and all revisions thereof would conform to the supreme law. The whole people of the state have no power to alter it save in accordance with their contract. They cannot do so, even by unanimous consent, if such alteration violates the Constitution of the United States. Should they make the attempt their courts are bound by the mandate of the Federal Constitution, and by the oath they have taken in conformity therewith and with their own Constitution, to declare such attempt futile, to disregard such violations of the supreme compact and decline to enforce it. There is no sovereignty in a state to set at naught the Constitution of the Union, and no power in the people to command their courts to do so. That issue was finally settled at Appomattox.

Certainly many other authorities could be cited. When, however, the supreme judicial authority in Colorado has pointed out this limitation upon the people of Colorado in changing their own constitution, and when the only thing with which we contend is an amendment to the Colorado Constitution contended to be void because violative of the United States Constitution, it can scarcely be contended that constitutionality is one whit affected by the fact or the extent of popular approval of the offending provision. The device was calculate to set at naught equality of franchise and to vest legislative control of Colorado in the minority of its people. The promotion of this amendment was expertly conducted. Its purpose was

wrong; its effect is illegal; and no sanctity inheres in the vote of the people to deprive others of their vested constitutional right, the right to vote. That exercise of the franchise is beyond the power of any majority, and an amendment so based and founded must be void.

C. THE SITUATION IN COLORADO TYPIFIES THE EVILS NECESSARILY TO BE REMEDIED BY THE SALUTARY DOCTRINES ANNOUNCED BY THIS COURT.

As shown in the Memorandum Opinion (Jurisdictional Statement, Exhibit A), the discrimination arising out of the unequal apportionment in the Colorado situation, as in each of the cases now before the Supreme Court, jurisdiction in which is now noted, and argument in which are now set, is a denial of the equal protection guaranteed by the Fourteenth Amendment.

1. The discrimination arises out of unequal apportionment and is gross and arbitrary. The discrimination is directly against suburban and urban centers and in favor of rural areas. This is unjustified, and time must serve to intensify effect, since population in the United States has for half a century been and is increasingly an urban and suburban function, and the votes of the majority may not be diluted simply because it lives in cities. Moreover, the arbitrary patterning of this result has amounted to a kind of gerrymandered or crazy-quilt distribution, which the majority of the Court can only justify by calling it a protection of "insular interests", and which reality must characterize as a sanctioned vesting of minority economic interests with the prerogatives of majority popular control. Representatives in a legislature represent people, not

mountains, nor plains, nor roads, nor forests, nor cattle. The people live in the cities and their suburbs, as once they lived on the farms and near the mines. The fact that they no longer do so does not mean that in a legislature we must represent "mining" or "farming" or "cattle raising". If these economic functions cease to be dominant in the legislature, it is because their importance in fact has ceased to be dominant so far as concerns the majority of people in the State. People and only people, wherever they live, must be represented, equally and with equal voice. If that result in some alteration in balance or economic controls, such is the necessary implicate of a vital, fluid, and changing economic world.

2. Inequality of voter representation deprives individual voters unquestionably of the equal protection of the laws, with a resultant impairment in the state legislative process, which must look to "interests" rather than to people, to the lobby and lobby controls rather than to the popular mandate. At best, it creates a situation of stalemate between the one house responsible directly to people and another responsible to no one but a vestiture of "insular interests". This necessarily results in a splitting of aim, a bifurcation of policy, and even a negation of those purposes to which the central aims of the nation are dedicated. The result must be an undermining of the federal system of government, obvious implicit in the notion that a majority of citizens of a state may somehow by amending their state constitution negative the rights of others federally derived. If this right of franchise can be so taken, then what other right guaranteed by the nation to its citizens may not in isolated states and territories be denied?

3. The justifications advanced, such as area, history,

the federal analogy, the availability of initiative, and even governmental boundaries are without cogency. Colorado has never recognized any basis for apportionment other than population; it has never recognized anything different in the one house than in the other, for both have been based on population. It has discovered, however, that a suddoof divorce in the Senate of the population nexus will result in a control of the Senate by certain minority economic interests which desire to preserve that control as against the majority urban and suburban population. It has been discovered that certain techniques of referendum salesmanship can persuade variant population groups, for various reasons, to support an amendment. It is argued that in this way the right of equal protection of the franchise under the Fourteenth Amendment to the United States constitution can be locally subverted. As the Colorado Court has pointed out, this is a time-worn argument, outmoded at Appomattox. It is the argument which has met every attempt to implement the basic rights decisions of this Court. The right of an individual is not dependent on the suffrance or the will of his neighbors or a majority of them. It is protected absolutely, and no matter by what majority desired to be put down, if it is in fact a right, its must be upheld.

The substantiality of the question here presented before the Court is inherent in these propositions. If indeed equality of franchise is a right, then it is protected under the Fourteenth Amendment. If so protected, a State constitutional provision purporting to ignore equality of franchise in so important a matter as the selection of the Senate of a State cannot stand. No more squarely placed nor substantive question, it is submitted, can be put before this Honorable Court for decision.

CONCLUSION

In conclusion, it is urged that the matters presented to the Court are of the highest substantive significance, and are cogent. It is urged that the Court take jurisdiction of this cause.

Most respectfully submitted,

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